

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1024 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
Nos. 1 to 5 No

GOVINDBHAI & CO.

Versus

MEHSANA DISTRICT PANCHAYAT

Appearance:

MR GT DAYANI for Petitioners

MR MEHUL SHARAD SHAH for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 18/08/98

ORAL JUDGEMENT

Learned Counsel for the parties have been heard on admission of this revision under section 115 of the Code of Civil Procedure.

Brief facts are that the respondent filed the suit against the revisionist for recovery of damages for

breach of contract committed by them. Written statement was filed by the revisionists, whereupon issues were framed. Evidence of the parties was partly recorded and in the meantime an application was moved by the revisionists that they may be permitted to pay the court fee on the counter claim set up in their written statement. That application was rejected by the Trial Court. It is therefore, this revision.

Contention of learned Counsel for the revisionists is that the Trial Court has given reasons for rejecting application for payment of court-fee on the counter claim but those reasons are untenable and beyond the scope of section 149 of the Code of Civil Procedure. Learned Counsel for the respondent on the other hand contended that firstly the written statement does not set out counter claim and does not fulfill requirements of a plaint which is sine qua non of the counter claim. Secondly, no cause of action is disclosed in the counter claim and the counter claim is prima facie time barred. Hence, the Court below was justified in refusing to grant permission to the revisionists to pay court-fee on the counter claim.

After examining the impugned order I find that it is a case decided within the meaning of section 115 of the Code of Civil Procedure. By rejecting the application of the revisionists practically the Court below has closed the right of the revisionists to raise counter claim in response to the plaint instituted by the respondent. Thus, the revisionists under the impugned order are prevented from raising counter claim which exceeds a sum of Rs.10 lacs and odd. It is, therefore, a case decided within the meaning of section 115 of the Code of Civil Procedure.

Impugned order suffers from jurisdictional error in as much as the Court below has not properly exercised jurisdiction in deciding the application of the revisionists. If a Court does not apply its mind to the real controversy raised in the application it can be said to have failed to exercise jurisdiction vested in it by law and can also be said to have improperly exercised jurisdiction vested by law in such Court.

For disposing of the application of the revisionists the Court below was required to consider only limited point whether the revisionists could be permitted to pay court fee on the counter claim. For this, section 149 of the Code of Civil Procedure was not at all considered by the Trial Court.

Section 149 provides that "where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable,, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

No oubt this section gives discretion to a Court to permit a party to pay court-fee at any stage of the suit but this discretion is to be exercised judicially and not arbitrarily. Discretion to refuse permission to the defendants to pay court-fee is like wise to be exercised judicially and not arbitrarily. Reasons given by the Trial Court are altogether irrelevant and arbitrary.

First reason given by the Trial Court is that written statement does not strictly fulfills the requirement of a plaint which is necessary even for a counter claim. However, this could not be a reason for rejecting the application of the revisionists for permission to pay court-fee on the counter claim. Instances are not rare where pleadings are loosely drafted but loose drafting of pleading is no ground to reject the entire pleading. Likewise instances are not rare where such loose drafting of pleadings is subsequently rectified by seeking amendment in such pleadings. Therefore, if law permits the defendant can apply the Court below to rectify the defects by moving appropriate amendment application. So far as cause of action is concerned, the same reasoning holds good. If the court-fee is permitted to be paid on the counter claim and objection is raised that no cause of action for counter claim is disclosed in the counter claim the counter claim can be rejected by the Court after hearing parties and not at the initial stage.

Second reasoning given by the lower Court is that the defendants have not disclosed how and in what manner they have suffered loss for which they are setting up counter claim. This is also a matter of defect in the pleadings and this could not be a ground for rejecting the application under consideration.

Last ground is that prima facie the counter claim was time barred. In returning such finding the Trial

Court has exceeded its jurisdiction by making observations which have taken away valuable right of the revisionists. The Trial Court has forgotten that the defendants could not have filed written statement unless the summons of the suit was served on them. Summons was served on 26.8.1996 and thereafter written statement was filed within limitation and the counter claim prima facie cannot be said to be time barred. Any way this plea should have been left open by the Trial Court. If in reply to the counter claim such pleading would have been raised by the plaintiff respondent the Trial Court could have been justified in giving such finding. Finding on merits of the counter claim is nothing but prejudging the issue and as such the Court below has travelled beyond its jurisdiction in considering the matters which were not required to be considered at the initial stage.

In the application, reasons have been given. Arguments have been advanced explaining why court-fee could not be paid on the counter claim. In short the contention has been that the written statement was drafted by some other Counsel but when parties were going to adduce evidence another Counsel was engaged who noticed that in the written statement counter claim was set up on which court-fee was required to be paid and then this application was moved. There is thus explanation of delay in paying court-fee. Moreover section 149 of the Code of Civil Procedure does not oblige the party seeking permission of the Court for payment of court-fee to explain the delay in making deficiency good in such court-fee or in paying whole of the court-fee prescribed by law to be paid by him. Thus, non explanation of delay is no ground for rejecting the application.

For the reasons given above the revision succeeds and is hereby allowed. The impugned order is set aside. Application of the revisionists for payment of court-fee on the counter claim is granted. Revisionists shall pay requisite court-fee in the Trial Court within two weeks from today. The Trial Court shall thereafter permit the respondent to file reply to the counter claim and shall frame additional issues arising out of the counter claim and reply thereon and then proceed to decide the suit in accordance with law. No order as to costs.

Sd/-

(D.C.Srivastava, J.)

m.m.bhatt

